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SUPREME COURT, U.S.
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No. 94-1048

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

NATIONAL FOOTBALL LEAGUE, *et al.*,
Petitioners,

v.

WILLIAM H. SULLIVAN, JR.,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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January 9, 1995

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QUESTIONS PRESENTED

1. In assessing under the Rule of Reason the legality of a restraint of trade that is allegedly ancillary but not essential to the legitimate activities of a monopolistic joint venture, can the factfinder take into account less restrictive alternatives to the restraint that would provide similar benefits?

2. Should the National Football League--an unincorporated association of 28 separately owned professional football clubs, each of which is independently operated through a distinct corporation or partnership, and all of which compete for players, coaches, and the like--be deemed a single enterprise with respect to an alleged conspiracy to prevent respondent from selling ownership interests in his member club to members of the public in order to acquire additional capital?

PARTIES TO THE PROCEEDING

Petitioners, who were defendants below, are the National Football League and twenty-one of its twenty-eight member clubs.* Respondent-plaintiff is William H. Sullivan, Jr.

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* Petitioner-defendant members of the National Football League own franchises in the following cities and areas: Atlanta (The Five Smiths, Inc.), Buffalo (Buffalo Bills, Inc.), Chicago (Chicago Bears Football Club, Inc.), Cincinnati (Cincinnati Bengals, Inc.), Cleveland (Cleveland Browns, Inc.), Dallas (Dallas Cowboys Football Club, Ltd.), Denver (PDB Sports Ltd.), Detroit (The Detroit Lions, Inc.), Green Bay (Green Bay Packers, Inc.), Houston (Houston Oilers, Inc.), Indianapolis (Indianapolis Colts, Inc.), Los Angeles (Rams) (Los Angeles Rams Football Co.), Minneapolis (Minnesota Vikings Football Club, Inc.), New Orleans (New Orleans Saints, Ltd.), New York (Jets) (New York Jets Football Club, Inc.), Phoenix (B&B Holdings, Inc.), Pittsburgh (Pittsburgh Steelers Sports, Inc.), San Diego (Chargers Football Co.), Seattle (Seattle Professional Football Club, Inc.), Tampa Bay (Tampa Bay Area NFL Football, Inc.), and Washington, D.C. (Pro-Football, Inc.).

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Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent William H. Sullivan, Jr. opposes the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case filed by petitioners, the National Football League ("NFL" or "league") and the 21 of its member clubs named as parties.

OPINIONS BELOW

The opinion of the court of appeals is reported at 34 F.3d 1091 and appears in Appendix A to the petition. The decision of the district court denying the motion to dismiss is reported at 795 F.Supp. 56 and

appears in Appendix B to the petition. The decisions of the district court denying the motions for summary judgment, directed verdict, and judgment as a matter of law appear in Appendices C, D, and E, respectively, to the petition.

JURISDICTION

The judgment of the court of appeals is dated September 16, 1994. A petition for rehearing was filed by the petitioners on September 30, 1994 and was denied on October 26, 1994, in an order that made changes to the court's original opinion. *See* Appendix F to the petition.

Jurisdiction in the district court was premised upon 28 U.S.C. §§1331 and 1337. Jurisdiction in this Court is based on 28 U.S.C. §1254(1).

STATUTE INVOLVED

Section 1 of the Sherman Act (15 U.S.C. §1) provides, in pertinent part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

STATEMENT OF THE CASE

Petitioners have identified two legal issues of purportedly controlling importance here: (1) whether the First Circuit erred in allegedly applying a "least restrictive alternatives" analysis to the allegedly ancillary restraint of trade imposed by the NFL that is being challenged and (2) whether the First Circuit erred in refusing to treat the NFL and its member clubs as a single enterprise incapable of conspiring with respect to that restraint. "Petition For A Writ of Certiorari," pp. 10-11 (Dec. 1994) ("Pet."). The first of these issues was raised neither in the district court nor in the court of appeals. Moreover, the analysis applied by both courts was significantly different from what petitioners now claim and is consistent with both the decisions of this Court and precedent from other circuits. The second issue was conceded by the NFL at the trial level and raised for the first time in the court of

appeals. That court rejected the NFL's single enterprise contention, and its rejection is consistent with the rulings of other courts that have had to consider the application of the antitrust laws to the league. In refusing to accept this argument, the First Circuit relied on the very opinion of the Eighth Circuit that petitioners now claim creates a split of authority.

In order to fairly analyze petitioners' arguments, it is necessary to consider at greater length the factual background to this lawsuit. It is also necessary to consider in detail what the lower courts actually did (and did not do) with respect to the two issues presented and to consider in detail what arguments petitioners made (and did not make) below concerning those issues.

I. FACTUAL BACKGROUND OF THE CASE.

This case involves an antitrust challenge by the former owner of the New England Patriots ("Patriots") football club to the NFL's uncodified policy banning entirely public ownership of member franchises, including ownership by public corporations. The Patriots had formerly been a member of the old American Football League ("AFL"), which had no restriction against public ownership.[1] Joint Appendix to the First Circuit ("J.A.") 451-52, 504. From 1960 to 1976, the club was publicly owned. *Id.* In 1976, respondent bought out the public shareholders, partly at the behest of NFL officials. *See* Exh. 1233 at 5. The publicly-owned status of the Patriots had been "grandfathered" as an exception to the public ownership ban when the AFL merged into the NFL in 1966, subject to the understanding that the club would eventually be brought into compliance with the league's policy. J.A. 469, 567; S.A. 108.

In December of 1986, the Boston Celtics professional basketball club made a public offering of 2.6 million limited partnership units at $18.50 per share. Exh. 1108. Respondent desired to do something similar by making a public offering of 49 percent of the Patriots and therefore raised the issue of modifying the NFL's public ownership ban

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[1] Nor do other major professional sports leagues--such as the National Basketball Association or Major League Baseball--have rules barring public ownership of major franchises. Joint Appendix to the First Circuit ("J.A.") 496-97; Supplemental Appendix to the First Circuit ("S.A.") 92-93, 213-14; Trial Exhibit ("Exh.") 1108 at 9.

at a league meeting held in October of 1987. At that meeting, respondent expressed support for a proposal previously presented by another NFL club owner that would permit public corporations to own stock in NFL teams. *See* Exh. 12. He also presented an alternative modification that read as follows:

> "A member club may transfer not more than 49% of its outstanding equity by means of a sale to the public of units in a master limited partnership or stock in a corporation, providing that any future transactions relating to the remaining control units in the limited partnership or control shares in the corporation would continue to be subject to the provisions of Article III of the Constitution and By-Laws." (Exh. 33 at 00000833.)

Discussion of these proposals was tabled at the October league meeting. Exhs. 33, 33A, 1801, 1805. Respondent thereafter sought to obtain the votes of 21 of the NFL's 28 club owners for his proposed modifications, in accordance with Article 3.5 of the NFL's constitution and bylaws, which requires that three-fourths of the members of the league approve any transfers of ownership of, or ownership interests in, a member club. Respondent was unable to obtain the requisite supermajority and former NFL Commissioner Pete Rozelle indicated that he would not support and might oppose the proposals and that any continuing efforts to change the league's ban on public ownership were futile. J.A. 610, 659-60; Exh. 36. Respondent sold the Patriots in October of 1988 for approximately $83.7 million, less than the team's true worth, especially in a market that included public investors. The NFL's policy thus prevented respondent from maintaining a majority share of a rapidly appreciating asset. In 1994, the Patriots were sold for a reported $165 million, then the highest price ever paid for an NFL club.

II. THE PRESENT LAWSUIT AND THE ISSUES RAISED BELOW.

A. History Of The Lawsuit.

Respondent filed the present lawsuit in May of 1991, alleging that the NFL's public ownership ban and the steps taken to enforce it violated Sections 1 and 2 of the Sherman Act (15 U.S.C. §§1, 2), as

well as state law. The suit was brought against the present petitioners, as well as former NFL Commissioner Pete Rozelle and present NFL Commissioner Paul Tagliabue. After denying motions to dismiss and for summary judgment, the district court for the District of Massachusetts (the Honorable Edward F. Harrington, Jr.) conducted a jury trial in September and October of 1993 that extended for 22 court days. At that trial, the district court granted a directed verdict for the individual defendants. It also granted a directed verdict of respondent's state law claims and on the monopolization claim, believing that the latter was surplusage in light of the antitrust conspiracy claim.

The jury found that the NFL's ban on public ownership was unreasonable, and had caused injury to the respondent in the amount of $38 million before trebling. In post-trial proceedings, the district court denied motions for judgment notwithstanding the verdict and for a new trial, but remitted the damage award to $17 million. On appeal, in a unanimous opinion authored by Chief Judge Juan Torruella, the First Circuit reversed and remanded the case for a new trial. The appellate court ruled that petitioners were not entitled to judgment as a matter of law, but found that the trial court's failure to give a particular jury instruction constituted reversible error, in conjunction with other errors.

B. Consideration Below Of The "Less Restrictive Alternative" Issue.

It is important to consider the extent to which the petitioners raised below the issues now being presented to this Court. Petitioners did proffer an instruction on joint ventures generally, but never offered one explaining the ancillary restraint doctrine. The district court instructed the jury as follows on the balancing to be undertaken pursuant to the Rule of Reason:

> "If the beneficial effects of the restraint outweigh the harmful effects, or if the net effect on competition is harmful but insubstantial, the contract is not unreasonable or unlawful.
>
> "In determining whether the contract, the so-called Rule 3.5 and the policy against public ownership was unreasonable, you may also consider defendants' purpose in imposing the rule and the policy.

> "A purpose or intent to harm competition by itself is not sufficient to establish an unreasonable restraint of trade. However, consideration of the purpose of the restraint may help you in determining if it would likely have a harmful effect on competition.
>
> "You may consider, for example, whether defendants imposed the contract to achieve a legitimate business purpose, and if so, *whether the restraint was tailored to achieve that legitimate business purpose or rather was broader than necessary.*" (S.A. 259; emphases added.)

Petitioners never objected to this instruction and never raised an issue concerning any portion of it in their post-trial motions. In their appellate brief, petitioners did not contend that the trial court's instruction about the need for consideration of whether the alleged restraint of trade is narrowly tailored misstated the law; instead, they simply argued that the public ownership ban should be presumed lawful, since it was ancillary to the allegedly legitimate functions of the NFL. "Brief of Defendants-Appellants," pp. 35-40 (March 1, 1994) ("Defs.' Br."). The First Circuit properly rejected this argument, noting that relevant Supreme Court precedent did not make inapplicable a Rule of Reason analysis merely because a given practice among joint venture participants is purportedly ancillary to legitimate activity.[2] 34 F.3d at 1102; Pet. App. 18a. It stated that the reasonableness of the public ownership ban should be considered by the jury and that "one factor" in such consideration should be an assessment of "less restrictive, equally beneficial" alternatives. 34 F.3d at 1103; Pet.App. 19a.

In their petition for rehearing, petitioners disputed the First Circuit's ruling, but again did not assert that it was inappropriate to consider under the Rule of Reason whether an alleged restraint is

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[2] The First Circuit did not hold that the public ownership ban was an ancillary restraint related to legitimate activities of the NFL. It did, however, assume *arguendo* that the ban could be so characterized and then concluded that the Rule of Reason would be applied by the factfinder to assess its legality. 34 F.3d at 1102; Pet.App. 17a-18a. A factfinder, of course, could determine that the ban is not related to the ability of the league to produce a quality product; the AFL did so, and other major sports leagues do so, without any similar prohibition.

overbroad. Instead, they *conceded* that a less restrictive alternative concept was an appropriate consideration, but contended that the First Circuit misanalyzed the application of the concept to this case.

> "One factor occasionally present in the rule of reason analysis is the less restrictive alternative concept. *E.g., Kentucky Fried Chicken Corp. v. Diversified Packaging Corp.*, 549 F.2d 368, 381 (5th Cir. 1977) (presence of less restrictive alternative 'is a factor to be considered in the reasonableness analysis'). The alternative must meet two tests: (1) It must be less restrictive of competition than the policy under challenge; and (2) it must provide the same benefits as the challenged policy. (Slip op. 22.)[3]
>
> "*It is undisputed that the alternative identified by the Court utterly fails to meet the second test.*" ("Appellants' Petition for Rehearing," p. 9 (Sept. 29, 1994); emphases in original.)

In a footnote, petitioners did contend that it was unnecessary to apply a "less restrictive alternative notion" to "joint venture analysis" because "[t]he analytical principles reflected in that notion are already incorporated in the process of determining whether the challenged practice is not only ancillary to the joint venture's purposes but is reasonably related to those purposes." *Id.* at 10 n.6. They went on to state that "[h]owever, in view of the fact that there can be no finding of a less restrictive alternative on the record in this case, there is no need for the Court to address this point." *Id.* at 11 n.6.

Thus, petitioners *admitted* that the less restrictive alternative concept was part of a Rule of Reason analysis, which is precisely what the First Circuit found. This Court is therefore being asked to address

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[3] Petitioners' contention in their rehearing brief is factually inaccurate, because the alternative proposal offered by respondent at the October 1987 league meeting did serve the same objectives as the public ownership ban. This conclusion is supported by a 1985 NFL internal legal memorandum discussing less restrictive alternatives (Exh. 7) and by the trial testimony of petitioners' own expert and fact witnesses (J.A. 432-33, 1413; S.A. 211).

an issue that was not only never raised below, but was also conceded by petitioners, who told the First Circuit not to address it.

C. Consideration Below Of The Single Enterprise Issue.

Petitioners also failed to raise the allegedly crucial single enterprise defense (based on *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984)) at the trial level with respect to the NFL, presumably because, as will be explained below, no court has ever accepted this defense in any antitrust action against the league.

Thus, petitioners did *not* present this argument as part of their motion to dismiss filed in June of 1992 or their summary judgment motion filed in June of 1993. *See* S.A. 1-28, 43-73. A *Copperweld* argument was instead advanced only in the separate dismissal and summary judgment motions filed by Pete Rozelle and Paul Tagliabue, who alleged that they could not be found liable for any agreement with their employer. S.A. 33-38, 81-84. Their separate contentions became moot when the trial court later directed a verdict in their favor. Likewise, the *Copperweld* argument was not raised with respect to the NFL and its member clubs in petitioners' motion for judgment as a matter of law during trial, in any post-trial motions, or in their notice of appeal.

Petitioners also proposed no jury instructions based on a *Copperweld* defense. The trial court instructed the jury that the NFL and its defendant member clubs entered into a contract or agreement with respect to the public ownership policy and Article 3.5. S.A. 238, 246. Petitioners' counsel did not object to these instructions; while he did seek to have the jury advised about joint ventures generally, he also said "[w]e propose a specific instruction that does not make it a matter of legal defense. And I know [plaintiff's counsel] will jump up and down if I make that argument." S.A. 273. Likewise, when confronted with a verdict form that advised the jury that the NFL and its member clubs entered into a contract or agreement, petitioners' counsel once again raised no objection and instead conceded that "[w]e understand your ruling as a matter of law. Clearly there was a contract entered into." J.A. 1512. Three days later, the same counsel told the jury with respect to the trial court's finding of a contract or agreement that "[w]e

don't challenge that. Nobody challenges that. It's an agreement, it's a contract . . . to abide by the [NFL] Constitution." S.A. 234.[4]

In sum, petitioners' statements and conduct at trial compel the conclusion that they deemed the single enterprise defense to be an untenable one and therefore consciously decided to raise no objections based on it. This is, of course, in stark contrast to the position that they are taking now.

The first time the petitioners raised the issue of the *Copperweld* defense with respect to the NFL and its member clubs was belatedly in their appellate brief, where they contended that the NFL and its member clubs functioned as a joint venture and could not legally conspire. Defs.' Br., pp. 28-35. The First Circuit elected to address the topic and rejected the NFL's claim, stating that the league and its members do not exhibit the unity of interests found to be a decisive prerequisite in *Copperweld*. 34 F.3d at 1099; Pet.App. 10a-12a. As explained below, this ruling is unassailably correct.

REASONS FOR DENYING THE PETITION

I. LEGAL FRAMEWORK ESTABLISHED BY THIS COURT'S PRECEDENTS.

The decisions of this Court applying the antitrust laws to joint ventures are far from being as confusing and unsettled as petitioners (and some commentators) claim. This Court has typically held that agreements among joint venturers to fix prices or divide markets are unlawful *per se*.[5] The one possible exception to this principle was that noted in *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1 (1979) ("*BMI*"), where the Court held that joint agreement by 20,000 music copyright owners to license commercial use of the

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[4] These concessions at the trial level undoubtedly influenced the district court's determination that respondent's Section 2 claim was surplusage. They also influenced respondent's decision not to seek an appeal of the directed verdict as to that claim.

[5] *E.g.*, *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332, 342-57 (1982); *United States v. Topco Assocs.*, 405 U.S. 596, 606-12 (1972); *Citizens Pub. Co. v. United States*, 394 U.S. 131, 135-36 (1969); *United States v. Sealy, Inc.*, 388 U.S. 350, 351 (1967); *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 598 (1951).

copyrighted works should be judged under the Rule of Reason. Although the agreement might be literally construed as one fixing prices, the Court noted that a *per se* analysis was inadvisable because "the agreement on price is necessary to market the product at all." *Id.* at 8. The Court found that a reasonableness inquiry was appropriate because it would be virtually impossible for the copyright owners to compete effectively without a joint licensing arrangement. *Id.* at 21-23.

In cases not involving overt price fixing or division of markets, the Court has applied a Rule of Reason, rather than a *per se*, analysis. *See, e.g.*, *Federal Trade Comm'n v. Indiana Fed'n of Dentists*, 476 U.S. 447, 459 (1986) (invalidating association's refusal to supply X-rays to insurers seeking to evaluate claims for benefits); *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 295-98 (1985) (expulsion decision by association should have been tested under the Rule of Reason); *National Collegiate Athletic Ass'n v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 101-02 (1984) ("*NCAA*") (invalidating restrictions on televised appearances by college football teams); *National Soc'y of Professional Engineers v. United States*, 435 U.S. 679, 694-96 (1978) ("*Professional Engineers*") (invalidating limitations on competitive bidding intended to promote the safety and quality of engineering on public projects).

In applying the Rule of Reason in joint venture cases, this Court has typically considered the full range of factors identified by Justice Brandeis in *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918), including the nature, history and purpose of the restraint, the market affected, and the objective sought to be obtained. One of the factors so considered by this Court is whether the objectives underlying the restraint could be achieved through a more narrowly constructed restriction. Thus, in the *NCAA* case, the television plan at issue was held to be "not even arguably tailored" to serve the purported objective of competitive balance; the Court noted that narrower restrictions were "much better tailored to the goal of competitive balance than the television plan . . .." 468 U.S. at 119. Similarly, in *Professional Engineers*, while the Court recognized that quality concerns and ethical concerns about deceptively low bids for engineering services were legitimate, the ban on competitive bidding at issue there was "simply too broad" to be sustainable. 435 U.S. at 696. As Professor Phillip Areeda has concluded after reviewing these and other cases, "[t]he importance

of less restrictive alternatives is clear . . .." VII PHILLIP E. AREEDA, ANTITRUST LAW, ¶1505b at 386 (1986) ("AREEDA").[6]

In *Professional Engineers*, this Court also made it equally clear that "[t]he Rule of Reason . . . has been regarded as a standard for testing the enforceability of covenants in restraint of trade which are ancillary to a legitimate transaction, such as an employment contract or the sale of a going business." 435 U.S. at 689. As noted above, the ban on competitive bidding involved in that case was held not to survive such a reasonableness scrutiny; it was contrasted invidiously with marketing restraints related to the safety of a product that "have no anticompetitive effect and that . . . are reasonably ancillary to the seller's main purpose." *Id.* at 696 n.22. In short, as the First Circuit noted, the ancillary restraint doctrine does not displace the Rule of Reason, but merely calls that rule into play. 34 F.3d at 1102; Pet.App. 18a. *Accord Los Angeles Memorial Coliseum Comm'n v. NFL*, 726 F.2d 1381, 1390 (9th Cir.) ("Contrary to the NFL's apparent belief, the ancillary restraint doctrine is not independent of the rule of reason"), *cert. denied*, 469 U.S. 990 (1984) ("*L.A. Coliseum*"). This reasonableness analysis consists of the assessment this Court has typically undertaken in joint venture cases, including a consideration of less restrictive, but equally beneficial, alternatives. 34 F.3d at 1103; Pet.App. 19a; *L.A. Coliseum*, 726 F.2d at 1396.

Given the foregoing, it is readily apparent that the First Circuit's joint venture analysis is well within the parameters of this Court's precedents.

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[6] While Chief Justice William Rehnquist has disagreed with the use of a "*least* restrictive alternative" analysis, he, too, has expressed support for the view that any restraint must be "reasonably necessary" to serve a joint venture's purported objectives for imposing it. *NFL v. North American Soccer League*, 459 U.S. 1074, 1080 (1982) (Rehnquist, J., dissenting).

II. THE FIRST CIRCUIT DID NOT UTILIZE A "LEAST RESTRICTIVE ALTERNATIVE" ANALYSIS AND THE ANALYSIS IT DID USE IS CONSISTENT WITH THE LAW OF THIS COURT AND OTHER CIRCUITS.

Petitioners' first point--that the First Circuit erred in utilizing a "least restrictive alternative" analysis--provides no basis for granting their petition, for several reasons.

First, as noted above in Section II.B of the Statement of the Case, this issue was neither raised to nor considered by the courts below. As a consequence, it should not be advanced here as a basis for certiorari. *Sisson v. Ruby*, 497 U.S. 358, 359 n.1 (1990); *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

Second, the petitioners have grossly mischaracterized the holding of the First Circuit by calling it a "*least* restrictive alternative" analysis. Pet. at 10. As noted in Section II.B of the Statement of the Case, the First Circuit simply said that "one factor" among many in the jury's reasonableness analysis should be whether "a reasonable, less restrictive alternative to the [public ownership] policy exists that would provide the same benefits as the current restraint." 34 F.3d at 1103; Pet.App. 19a. The trial court's instruction to the jury, quoted above, was phrased similarly. Petitioners attempt to argue that this consideration of "less restrictive alternatives" is really a consideration of "least restrictive alternatives," since no matter what lesser restraint is identified, an even less onerous one could be hypothesized. Pet. at 10 n.8. This contention ignores the rulings below. The least restrictive alternative in this case would be having no constraint whatsoever on public ownership. Yet the First Circuit (and the trial court) would not regard that as a viable alternative, because it could not provide the same alleged benefits (assuming *arguendo* that there are some) of the NFL's current policy. Both the appellate and trial court took pains to focus on lesser

alternatives that could be deemed *equally* beneficial, something petitioners ignore.[7]

Finally, the petitioners have been unable to identify any true split among the circuits justifying certiorari. The decisions from other circuits involving sports leagues or associations all utilize the same Rule of Reason analysis,[8] which was also utilized by this Court in *NCAA*. Petitioners try to contrive a conflict by focussing on the decisions of the Tenth Circuit in *SCFC ILC, Inc. v. VISA USA, Inc.*, 36 F.3d 958 (10th Cir. 1994) and the District of Columbia Circuit in *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1033 (1987). Neither case, however, presents a conflict.

In *SCFC*, the Tenth Circuit stated that:

> "We do not read the [Supreme] Court's precedent involving joint ventures to imply any special treatment or differing antitrust analysis. Indeed, aside from clarifying the inappropriateness of automatically invoking per se scrutiny of a joint venture's alleged antitrust violation, the Court has not articulated a different rule of reason approach. Thus, under the Court's precedent, cooperative business activity in one setting may permit its participants to achieve market

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[7] Likewise, other cases cited by petitioners that purportedly apply a "least" restrictive alternatives analysis did nothing of the kind. *See Image Technical Servs., Inc. v. Eastman Kodak Co.*, 903 F.2d 612, 618 (9th Cir. 1990) (consideration of a "less restrictive" alternative), *aff'd on other grounds*, 504 U.S. ___, 112 S.Ct. 2072 (1992); *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1354 (5th Cir. 1980) (consideration of whether realtors' association's membership rules were "narrowly tailored to accomplish their legitimate goals").

[8] In addition to the First Circuit's opinion, *see Chicago Professional Sports Ltd. Partnership v. National Basketball Ass'n*, 961 F.2d 667, 675-76 (7th Cir.), *cert. denied*, 113 S.Ct. 409 (1992); *L.A. Coliseum*, 726 F.2d at 1396; *North American Soccer League v. NFL*, 670 F.2d 1249, 1261 (2d Cir.), *cert. denied*, 459 U.S. 1074 (1982). *See also United States Trotting Ass'n v. Chicago Downs Ass'n, Inc.*, 665 F.2d 781, 790 (7th Cir. 1981); *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1183 (D.C. Cir. 1978) (both considering whether challenged restraint went beyond the level reasonably necessary to accomplish the legitimate business purpose sought to be effectuated).

> efficiencies or economies of scale, while in another, a similar activity might run afoul under rule of reason review." (36 F.3d at 964-65; footnote omitted.)

As the Tenth Circuit went on to note, "[w]hat we ask under Section 1 is whether the alleged restraint is reasonably related to [defendant's] operation and *no broader than necessary to effectuate the association's business*." *Id.* at 970; emphases added. This language clearly permits consideration of less restrictive but equally beneficial alternatives.[9] The First Circuit therefore understandably *relied* on *SCFC* to support its analysis of the application of the antitrust laws to joint ventures. 34 F.3d at 1102; Pet.App. 19a.

Judge Robert Bork's opinion in *Rothery* is also consistent with the First Circuit's ruling. He said:

> "To be ancillary, and hence exempt from the per se rule, an agreement eliminating competition must be subordinate and collateral to a separate, legitimate transaction. The ancillary restraint is subordinate and collateral in the sense that it serves to make the main transaction more effective in accomplishing its purpose. Of course, the restraint imposed must be related to the deficiency sought to be achieved. *If it is so broad that part of the restraint suppresses competition without creating efficiency, the restraint is, to that extent, not ancillary*. [Judge (later Chief Justice)] Taft added the further obvious qualification that even restraints ancillary in form are illegal if they are part of a general plan to

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[9] The Tenth Circuit upheld the rules limiting membership in a credit card issuers' association primarily because VISA U.S.A. lacked market power that could affect output or prices. 36 F.3d at 966-68, 972. Here, of course, the NFL is an adjudged monopolist in the market for major league professional football in the United States. *United States Football League v. NFL*, 644 F.Supp. 1040, 1042 (S.D.N.Y. 1986), *aff'd*, 842 F.2d 1335 (2d Cir. 1988). Furthermore, it controls, through its public ownership policy, 100 percent of the ownership interests included in the relevant market found by the jury, which was not contested on appeal.

gain monopoly control of a market." (792 F.2d at 224; footnote omitted; emphasis added.)[10]

Again, *Rothery* makes it clear that the breadth of the challenged restraint is a proper consideration; it is simply factored into the analysis of ancillarity. *See id.* at 231 n.4 (Wald, J., concurring). This view confirms Judge Bork's previously stated position that ancillary restraints imposed by a joint venture should be found lawful only if "the parties are cooperating in an economic activity other than the elimination of rivalry and the agreement [incorporating such restraints] must be capable of increasing the effectiveness of that cooperation *and no broader than necessary for that purpose.*" ROBERT BORK, THE ANTITRUST PARADOX 279 (1978); emphases added.[11] *Cf.* AREEDA ¶1505b at 388 (when courts say a restraint must be "reasonably necessary" to achieve a legitimate objective, "[i]t would not be if equal benefits could be obtained through substantially less restrictive routes").

What petitioners are really asking this Court to do is to undertake a step no previous Supreme Court or circuit court ruling has undertaken: to remove the consideration of less restrictive but equally beneficial alternatives from any inquiry into the practices of joint ventures, either at the phase of deciding whether the practice is ancillary or at the phase of balancing under the Rule of Reason. To do so would require this Court to overrule its own decisions in *Professional Engineers* and *NCAA* and the uniform precedent from the circuit courts.

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[10] Again, the dispositive point in *Rothery* was that Atlas Van Lines' adoption of a new policy terminating agents which did not transfer independent operations to separate and distinct companies was not illegal in light of "Atlas' small market share." *Id.*

[11] Judge Bork in this treatise further noted that a joint venture and its ancillary restraints must also not involve a collective market share that presents a realistic danger of output restriction and reflects no primary intent or purpose to restrict output. *Id.* The public ownership ban fails to satisfy either of these criteria, since the NFL has a 100% collective market share and there was abundant record evidence of an intent to eliminate competition in the relevant market. 34 F.3d at 1100; Pet.App. 13a-14a. *See* Drew Krause, *The National Football League's Ban on Corporate Ownership: Violating Antitrust To Preserve Traditional Ownership--Implications Arising From William H. Sullivan's Antitrust Suit*, 2 Seton Hall J. of Sports Law 175, 198-200 (1992) (noting that public ownership ban is not a valid ancillary restraint).

Indeed, the NFL goes even one step further in asking that the public ownership ban be deemed legal without any inquiry into the anticompetitive nature of that prohibition or the existence of any procompetitive reasons for it. At the trial below, respondent offered extensive evidence that the asserted reasons for the ban either lacked substance or were based on a fear of competition that, in the words of this Court in *Professional Engineers* was "nothing less than a frontal assault on the basic policy of the Sherman Act." 435 U.S. at 695. The jury could thus have reasonably concluded that no rule restricting the form of ownership of NFL member clubs would have been reasonable, even if equally beneficial but less restrictive alternatives were available. Such a conclusion would clearly be warranted where the claimed rationales in favor of the public ownership ban were insubstantial in comparison to its anticompetitive effects. Petitioners contend that they were entitled to judgment as a matter of law on the legality of the ban, but have not identified a single procompetitive or efficiency-enhancing aspect of it.[12]

III. THE FIRST CIRCUIT'S RULING ON THE SINGLE ENTERPRISE DEFENSE IS CONSISTENT WITH PRECEDENT.

The First Circuit's ruling that the NFL is an entity capable of conspiring with its members also furnishes no basis for a writ of certiorari.

First, while the issue was raised to and decided by the First Circuit, this Court should consider whether petitioners are estopped to rely on this issue for present purposes, given their repeated concessions at the trial, discussed in Section II.C of the Statement of the Case. *See United States v. McCaskey*, 9 F.3d 368, 378 (5th Cir. 1993) (discussing doctrine of judicial estoppel), *cert. denied*, 114 S.Ct. 1565 (1994). Such estoppel is particularly appropriate here because, had petitioners pressed the issue at the trial level, respondent would have presented evidence relating to exceptions to the single enterprise concept that were

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[12] This is not a case like *BMI* where the restraint (a blanket license) was necessary to create the market alleged to be anticompetitive. Here, as in *NCAA*, the product at issue was "still sold on an individual basis, only in a non-competitive market." 468 U.S. at 114.

recognized by this Court in *Copperweld*, such as the "personal stake" exception where corporate officers acting on their own behalf can conspire with their employer. 467 U.S. at 769 n.15. In addition, the trial court might not have directed a verdict on respondent's monopolization claim, which it believed constituted surplusage, given the claim under Section 1 of the Sherman Act.

Second, even if the Court does deem the issue to be properly preserved, there is no split of authority among the circuits on this matter.

While this Court has never had occasion to consider the status of the NFL in connection with the single enterprise theory and while commentators have disagreed about the topic, circuit court precedent in antitrust cases brought against the league has uniformly decided the question adversely to the NFL. Since 1982, courts in five different circuits have ruled explicitly or by implication that the league and its 28 member clubs are sufficiently separate economic actors to be subject to 15 U.S.C. §1. *L.A. Coliseum*, 726 F.2d at 1389-90; *North American Soccer League v. NFL*, 670 F.2d 1249, 1256-58 (2d Cir.), *cert. denied*, 459 U.S. 1074 (1982) ("*NASL*"); *McNeil v. NFL*, 790 F.Supp. 871, 879-80 (D.Minn. 1992); *Mid-South Grizzlies v. NFL*, 550 F.Supp. 558, 566-67 (E.D.Pa. 1982), *aff'd*, 720 F.2d 772 (3d Cir. 1983), *cert. denied*, 467 U.S. 1215 (1984); *Brown v. Pro-Football, Inc.*, 1992-1 Trade Cas. (CCH) ¶69,747 at 67,403-04 (D.D.C. 1992) (appeal pending). Similar implicit determinations exist in other older cases.[13]

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[13] *See Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1177 & n.11 (D.C. Cir. 1978); *Mackey v. NFL*, 543 F.2d 606, 616 & n.19 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977); *Kapp v. NFL*, 390 F.Supp. 73, 80-82 (N.D.Cal. 1974), *aff'd in part and rev'd in part*, 586 F.2d 644 (9th Cir. 1978), *cert. denied*, 441 U.S. 907 (1979); *United States v. NFL*, 116 F.Supp. 319, 321 (E.D.Pa. 1953).

Petitioners cite the dissent of Judge Spencer Williams in *L.A. Coliseum* in support of their view. Pet. at 22 n.24. However, he stated that NFL clubs do have "independent and economically significant identities" when dealing with "upstream suppliers," which he defined to include "potential investors." 726 F.2d at 1406 (Williams, J., dissenting). Thus, the present case, involving a ban on certain potential investors in NFL clubs, would not necessarily bring the single enterprise doctrine into play, in Judge Williams' view.

(continued...)

The cases decided since 1982 arose in a variety of contexts. The jury in the *L.A. Coliseum* case invalidated the NFL's franchise relocation rule. The *Mid-South Grizzlies* case involved exclusion of a proposed expansion franchise, while *Brown* involved the fixing of wages for development team players in the 1989 season. The jury in the *McNeil* case invalidated the league's rules regarding rights of first refusal and compensation for football players whose contracts expire. *See McNeil v. NFL*, 1992-2 Trade Cas. (CCH) ¶69,982 (D.Minn. 1992). And the *NASL* case involved the invalidation of a rule preventing owners or those in control of an NFL member club from owning a team in any other major sports league. In these cases, the courts looked to the facts that NFL clubs: are owned by distinct corporations or partnerships; do not share expenses, capital expenditures, profits or losses; are managed independently and make their own decisions as to the hiring and compensation of players and coaches, ticket prices, and the terms of stadium leases; derive separate revenues from sources such as local television and radio, parking, concessions and luxury box seats; have widely varying profits; compete in the acquisition of players, coaches and management personnel; and compete directly or potentially for fan support, media space, and local television and radio revenues. *McNeil v. NFL*, 790 F.Supp. at 879 n.10. The district court in *McNeil* noted that the various circuits had focussed on the fact that, despite partial revenue sharing, the financial performance of each NFL team does not necessarily rise or fall with that of the others. *Id.* at 880 n.11. It also noted that not all NFL club owners viewed the teams as a single economic unit, and that at least one has characterized them as "vicious competitors." *Id.* at 879 n.9. Similar evidence of such competition was presented here.

Petitioners' response to such precedent is that most of these cases antedate this Court's decision in *Copperweld*. They point to the fact that the Eighth Circuit in *City of Mt. Pleasant v. Associated Elec. Coop.*, 838 F.2d 268 (8th Cir. 1988), relying on *Copperweld*, ruled that

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[13] (...continued)

Petitioners also cite Professor Areeda in support of their view (Pet. at 22 n.25), but fail to note that he believed the *NASL* case, which dealt with a rule prohibiting owners of NFL clubs investing in other professional sports, was properly decided. He asserted that Section 1 of the Sherman Act "should govern the league rule because it controls the behavior of team owners as independent actors in the investment market." AREEDA ¶1478d at 358. The same is true of the public ownership ban here.

a joint venture consisting of rural electrical cooperatives constituted a single enterprise incapable of conspiring within the meaning of Section 1 of the Sherman Act, and speculate that "[t]he case at bar would have been decided differently in the Eighth Circuit." Pet. at 19.[14] However, the single enterprise status of the NFL *was* decided by a district court in the Eighth Circuit (in the *McNeil* case) four years after *Mt. Pleasant* and eight years after *Copperweld*. That district court--the Honorable David S. Doty in the District of Minnesota--ruled that an argument identical to the one presented here was barred by this Court's ruling in *NCAA*:

> "The court believes that [the NFL's] interpretation of *Copperweld* is irreconcilable with the Supreme Court's decision in [*NCAA*,] in which the Court applied §1 to restraints that the NCAA claimed were necessary to facilitate the joint venture of a college football league. Although acknowledging that college football was 'an industry in which horizontal restraints on competition are essential if the product is to be available at all,' [468 U.S.] at 101 . . . the Court nevertheless determined that the challenged restraints were subject to an abbreviated rule of reason analysis, expressly relying on precedent that held that 'joint ventures have no immunity from antitrust laws.' *Id.* at 113 . . .. Based on the foregoing, the court rejects defendants' contention that *Copperweld* immunizes them from antitrust liability, concludes that the NFL defendants are not a single economic entity for purposes of liability under §1 of the Sherman Act and

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[14] Petitioners also cite some *dicta* in *Chicago Professional Sports Ltd. Partnership v. National Basketball Ass'n*, 961 F.2d 667, 676 (7th Cir.), *cert. denied*, 113 S.Ct. 409 (1992), for the proposition that the Seventh Circuit might agree that sports associations should be viewed as single enterprises. Pet. at 20. Of course, the holding in that case was that the National Basketball Association's telecasting rules at issue there violated Section 1 of the Sherman Act. 961 F.2d at 676-77. *See also United States Trotting Ass'n v. Chicago Downs Ass'n, Inc.*, 665 F.2d at 787-90 (applying Rule of Reason to antitrust counterclaim against sports association).

> denies their motion for summary judgment on that basis.'" (790 F.Supp. at 880.)[15]

This decision comports completely with the First Circuit's ruling, which cited the district court opinion in *McNeil*. 34 F.3d at 1099; Pet.App. 11a. *Cf. Volvo North America Corp. v. Men's Int'l Professional Tennis Council*, 857 F.2d 55, 71 (2d Cir. 1988) (holding sports league and its members were separate entities for antitrust purposes, citing *NCAA* and *NASL* cases). The First Circuit additionally *relied* on *Mt. Pleasant*, noting that the critical inquiry in that case was whether the electrical cooperative's members pursued interests diverse from that of the cooperative. 34 F.3d at 1099; Pet.App. 11a. *See* 838 F.2d at 274-77. It went on to point out that such diverse interests unequivocally exist here.

Even assuming *arguendo* that the NFL and its member clubs should be treated as a single entity for some purposes, there is no basis to conclude that they should be treated as such an entity for the purposes of adjudging the legality of the public ownership ban. Team owners do compete for investment capital and the effect of the ban forecloses a major source of such capital from them. Clearly, many team owners wanted that ban to remain in place because they feared that public ownership of any type would inhibit their respective abilities to compete in the investment market. 34 F.3d at 1100; Pet.App. 12a-13a. These are precisely the types of diverse interests that the court in *Mt. Pleasant* considered crucial in determining whether members of an association can conspire.

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[15] It should be noted that this Court in *NCAA* cited a law review article (468 U.S. at 99 n.18), which specifically advocated that the NFL not be treated as a single entity for antitrust purposes. *See* Maxwell Blecher and Howard Daniels, *Professional Sports And The "Single Entity" Defense Under Section One Of The Sherman Act*, 4 Whittier L.Rev. 217, 232-33, 235-38 (1982).

While there are differences between the NCAA and the NFL (such as the number of member teams), it has been noted that college football games are scheduled years in advance, so each NCAA member's ability selectively to choose worthy opponents is limited. Lee Goldman, *Sports, Antitrust, and The Single Entity Theory*, 63 Tulane L.Rev. 751, 786 (1989) ("Goldman"). And, as noted by Judge Doty, each co-venturer in the NCAA has an interest in the success of other co-venturers, just as in professional sports leagues. *See id.*

Petitioners argue that the NFL club owners could have constituted the league as a corporation with unincorporated divisions, in which case the single entity defense would be applicable, and contend that antitrust liability ought not to be premised on the form of organization which they chose. Pet. at 22. However, the Court in *Copperweld* limited its holding to concerted action between a corporation and its wholly owned subsidiary, due to the fact that they exhibit a "complete unity of interest" and that their acts are guided by one "corporate consciousness." 467 U.S. at 770. That is manifestly not true of the NFL.[16] That the league could have structured its operations in a more unified fashion is legally irrelevant; "the analysis of whether there is an agreement for antitrust purposes must take the market as it currently exists, not as it hypothetically might have been." Goldman at 765; footnote omitted.

Moreover, adoption of the legal principle advanced by petitioners would, in the words of one commentator, "pose[ ] a dangerous precedent for a diverse range of substantive areas," such as the antitrust treatment of typical manufacturer/distributor relations. *Id.* at 792-93. It is respectfully submitted that the Court should not make such a precedent in a case like this one, where it is clearly unwarranted.

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[16] To the extent petitioners are comparing the NFL to a law firm (Pet. at 21 & n.23), the analogy is inapposite. *See* Goldman at 780-82. Members of a law firm typically share revenues from a common "pot," whereas the NFL teams have separate revenue sources (such as from sales of luxury box seats or from local television contracts). Moreover, law partners are subject to the day-to-day control of their firm and usually cannot make large capital expenditures without prior firm approval. This is not true of NFL clubs. Finally, no single law firm exhibits the market power of the NFL.

Likewise, petitioners' analogy of General Motors imposing restrictions on the sale of its stock by shareholders is inapposite. Pet. at 21. The better analogy would be to an agreement among General Motors and its shareholders to limit the investment decisions of the latter. Professor Areeda has clearly indicated that such an agreement would violate Section 1 of the Sherman Act. AREEDA ¶1476a at 338, ¶1478d at 358.

CONCLUSION

For the reasons stated above, the Court should deny the petition for a writ of certiorari to the Court of Appeals for the First Circuit.

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